Supreme Court, U.S.
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No. 92-635

In The

Supreme Court of the United States

October Term, 1992

LAWRENCE E. WALSH,

Petitioner,

v.

BOARD OF ADMINISTRATION OF THE PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California In And For The Third Appellate District

PETITIONER'S SUPPLEMENTAL BRIEF

BARBARA LANG BETTS
(Counsel of Record)
Mailing Address:
441 Sandburg Drive
Sacramento, California 95819
(916) 457-0959

Attorney for Petitioner

November 3, 1992

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PETITIONER'S SUPPLEMENTAL BRIEF

I. RESPONDENT BOARD OF ADMINISTRATION OF PERS FILED A PETITION ON OCTOBER 16, 1992, NO. 92-678 ADVOCATING PENSION RIGHTS IN CALIFORNIA ARE PROTECTED BY THE CONTRACT CLAUSE CONTRARY TO THEIR POSITION HEREIN

Subsequent to the filing of the petition herein on October 8, 1992, the Respondent on October 16, 1992, filed a Petition for a Writ of Certiorari to the Court of Appeal of California, Third Appellate District: *The Board of Administration of the Public Employees' Retirement System of the State of California, et al., Petitioners, v. Pete Wilson,*

Governor of the State of California, et al., Respondents, No. 92-678. The opinion of the California Court of Appeal reported at 6 Cal.Reptr. 2d 77 was cited as *Claypool, et al., Petitioners, v. Wilson, The Board of Administration of the Public Employees' Retirement System of the State of California, et al., Respondents* (hereafter *Claypool*). PERS is the common party in the *Walsh* and *Claypool* cases with similar issues, and yet it has taken contrary positions in the two.

By letter, respondent herein has waived the right to file a brief in opposition to Walsh in accordance with Supreme Court Rule 15.5. Briefs and arguments advanced in the lower courts by PERS were based on the theory that Walsh did not have a vested right to the statutory benefits in effect during his rendition of service protected under the Contract Clause of the United States Constitution. PERS further asserted and the Courts' held that specific retirement benefits could be destroyed, completely abrogated and eliminated based on Article IV sec. 4 of the California Constitution which provided: "The Legislature may, prior to their retirement, *limit* the retirement benefits payable to members of the Legislature who serve during or after the term commencing in 1967." (Emphasis added) As long as any pension benefit remained although not payable until twelve years later and substantially reduced, a contract was not impaired according to PERS and the Appellate Court. Walsh has had four separate and distinct pension rights eliminated and destroyed, not capped or limited.

In *Claypool* PERS asserts that "The fact that the right to receive a benefit is subject to a condition that might ultimately cut off payment at some future time does not

change its vested character . . . " (*Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 749. In *Walsh* based on Art. IV, sec. 4, PERS argued and the Courts' held that his pension rights were not vested and therefore not protected by the Contract Clause.

In *Claypool* a lower inflation benefit was substituted for another inflation benefit. PERS argues that the modification was a violation of vested rights citing *Betts v. Board of Administration PERS* (1978) 21 Cal.3d 859, 863 ("a pension right may not be destroyed, once vested, without impairing a contractual obligation of the employing entity"). Thus, the *Claypool* retirees are suffering a reduction in their inflation benefit which PERS rightfully argues is an impairment of contract. Contrast the impairment which Walsh has suffered; loss of his early reapportionment retirement benefit; loss of the cost of living increase from 1974 to 1986; loss of medical and health benefits; and a special benefit for those retiring in 1974. PERS' position in these two cases before this court is absolutely incongruous.

In PERS' petition filed with your Court, PERS alleges that fund trustees have the legal obligation to perform their duties solely in the interest of plan beneficiaries. In *Walsh* they have violated their fiduciary duty to advise, inform and protect him at every turn.

II. YOUR COURT HAS RECENTLY AGREED TO HEAR TWO PENSION FUND CASES REGARDING RETIREES AND EMPLOYEES UNDER PRIVATE PENSION PLANS; PUBLIC RETIREES AND EMPLOYEES NEED THE PROTECTION OF THIS COURT IN ACCORDANCE WITH THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

After Walsh's petition had gone to the printers, your honorable Court on October 5, 1992, agreed to hear *Mertens, et al., v. Hewitt Associates,* No. 91-1671, and *Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.,* No. 91-1677. Both of these are pension cases involving private pension plans covered by ERISA.

The Mertens case, is particularly pertinent to some of the issues raised herein concerning the duties and obligations of a pension plan fiduciary. The U.S. Solicitor General filed an amicus curiae brief supporting the retirees' brief, and asking you to end "a persistent and widening conflict among the circuits."

The employees and retirees of private pension plans have been protected by Congress by the enactment of ERISA and your decisions interpreting it thereafter. Public employees and retirees of defined benefit plans were denied the specific protections and benefits of ERISA, and must seek your protection under the United States Contract Clause. The need to affirm and clarify the affirmative duty of the fiduciary of a public pension trust to advise, and inform and protect its beneficiaries is paramount to the welfare and peace of mind of hundreds of thousands of public employees and retirees.

CONCLUSION

Petitioner again urges this Court to grant the petition for writ of certiorari and reverse the judgment of the lower court.

DATED: November 3, 1992.

Respectfully submitted,

BARBARA LANG BETTS

Counsel of Record
441 Sandburg Drive
Sacramento, California 95819